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### SUMMARY

In these Comments, PTC Cellular ("PTC-C"), a subsidiary of Peoples Telephone Company, respectfully submits that the Commission should forbear from applying Section 226 of the Communications Act, as enacted by the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"),<sup>1</sup> to the provision of cellular telephone service in conjunction with rental car service. Enforcement of TOCSIA is not necessary to ensure reasonable and non-discriminatory charges and practices by rental car phone providers, since the competitive marketplace already deters unreasonable or discriminatory conduct. Further, enforcement of TOCSIA is not necessary to protect consumers of rental car phone services, particularly since the users of these specialized services are generally sophisticated consumers who are unlikely to be defrauded or otherwise harmed. Moreover, full compliance with TOCSIA by rental car phone providers and the underlying cellular carriers would be enormously expensive, cause consumer confusion, and would result in numerous illogical results. Thus, forbearance from the application of TOCSIA to commercial mobile services will clearly serve the public interest.

In addition, PTC-C submits that consumer choice and competition demand that all facilities-based cellular carriers be subject to equal access obligations. Indeed, universal equal access requirements should be adopted regardless of the Commission's decision regarding the application of TOCSIA.

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<sup>1</sup> 47 USC § 226 (1991).

Cellular resellers such as PTC-C as well as subscribers must have the flexibility to establish a consistent relationship with a particular IXC. As such, the Commission should require uniform equal access by all cellular licensees without delay.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Implementation of Sections 3(n) ) GN Docket No. 93-252  
and 332 of the Communications )  
Act )

To: The Commission

**COMMENTS OF PTC CELLULAR**

PTC Cellular ("PTC-C"), a subsidiary of Peoples Telephone Company hereby respectfully submits these comments in response to the Commission's October 8, 1993 Notice of Proposed Rule Making ("NPRM") in the above-referenced proceeding.

PTC-C is a reseller of cellular telephone service primarily in conjunction with rental cars.<sup>1</sup> PTC-C enters into agreements with rental car firms to install its credit card activated cellular phones in rental cars, and resells cellular service to the end-user. PTC-C also offers hand-held cellular portable phones at rental car desks for use by rental car customers. PTC-C does not own any cellular network facilities and is not affiliated with the underlying cellular network carrier who is responsible for routing the calls over the cellular network(s) and for connecting the call into the public switched landline network. Rather, PTC-C resells the cellular carrier's

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<sup>1</sup> PTC-C's parent, People's Telephone Company, is a leading provider of independent (non-local exchange carrier provided) public pay telephones. As a public payphone provider, Peoples has considerable experience in implementing compliance with the provisions of the Telephone Operator Consumer Service Improvement Act of 1990 ("TOCSIA").

transmission service in conjunction with affording use of cellular equipment as part of overall rental car service. Customers are required to sign a separate contract for the use of PTC-C's hand-held cellular phones, and customers of PTC-C's in-car cellular phones receive full information as to the rates, terms and conditions for use of the service when they obtain their rental cars. As with other users of cellular service, customers who use PTC-C's cellular phones must pay rates that include charges for air-time in addition to any long distance tolls, roaming or other charges they may incur.

For the reasons discussed below, the Commission should forbear from applying Section 226 of the Communications Act, as enacted by the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"),<sup>2</sup> to the provision of cellular telephone service in conjunction with rental car service. In addition, consumer choice and competition demand that all facilities-based cellular carriers be subject to equal access obligations.

I. THE COMMISSION SHOULD FORBEAR FROM APPLYING TOCSIA TO COMMERCIAL MOBILE SERVICES PROVIDERS

A. Background

Congress enacted TOCSIA in 1990 in response to consumer complaints about charges and business practices of certain

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<sup>2</sup> Pub. L. No. 101-435, Stat. 986 (1990), codified at 47 USC § 226 (1991).

operator services providers ("OSPs").<sup>3</sup> These complaints centered around the failure of certain OSPs to identify themselves to callers, the high rates that certain OSPs charged for their services, and the inability of consumers to dial access codes uniformly at pay telephones and other "aggregator" phones to reach interexchange carriers ("IXCs"). To remedy this situation, Congress required that callers be provided with two forms of OSP identification. First, each OSP must audibly identify, or "brand," its services on two occasions prior to completing the call.<sup>4</sup> Second, each aggregator must "post" the identity and rates of its presubscribed OSP on or near the telephone.<sup>5</sup> In addition, aggregators are also prohibited from blocking access to OSPs.<sup>6</sup>

TOCSIA defines "aggregator" as a person or entity that makes "telephones available to the public or to transient users of its premises . . . ." <sup>7</sup> The legislative history of TOCSIA specifically lists "hotels, hospitals [and] universities" as examples of the "premises" at which "aggregator" telephones are found.<sup>8</sup> By contrast, telephones in rental cars, airplanes, trains and other forms of mobile transportation were not

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<sup>3</sup> S. Rep. No. 439, 101st Cong., 2d Sess. 1 (1990).

<sup>4</sup> 47 USC §226(b)(1)(A), (C).

<sup>5</sup> 47 USC §226(c)(1)(A).

<sup>6</sup> 47 USC §226(c)(1)(B).

<sup>7</sup> 47 USC §226(a)(2).

<sup>8</sup> S. Rep. No. 439 at 2.

mentioned. See, e.g., U.S. v. Koonce, 991 F.2d (1992) (inclusion of one category implies exclusion of others.)

On March 6, 1992, three of GTE Corporation's subsidiaries engaged in credit card mobile services filed a Petition for Declaratory Ruling with the Commission requesting a ruling that the requirements of TOCSIA do not apply to its mobile phone operations. In a decision released August 27, 1993, the Acting Chief of the Common Carrier Bureau ("Bureau") denied GTE's Petition.<sup>9</sup> The Bureau's decision focused on the definition of an "aggregator" and "OSP" for purposes of TOCSIA. The Bureau did not address the issue of whether it had authority to waive the obligations of TOCSIA as applied to cellular resellers such as PTC-C.

In this regard, Congress recently enacted new Section 332 of the Communications Act which expressly gives the Commission authority to waive certain Title II requirements for commercial mobile services, which includes cellular resellers such as PTC-C. The TOCSIA requirements found in Section 226 are among the Title II provisions that may be waived.<sup>10</sup> In response to this Congressional action, the Commission specifically asks in this proceeding whether the Commission should exempt commercial mobile services from the application of the TOCSIA requirements.<sup>11</sup>

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<sup>9</sup> Declaratory Ruling, DA 93-1022 (released August 7, 1993).

<sup>10</sup> USC §332 (c)(1)(A).

<sup>11</sup> NPRM at ¶68.

B. Application of Section 332 to TOCSIA

Section 332(c)(1)(A) permits the Commission to forbear from applying certain Title II requirements,<sup>12</sup> including TOCSIA, to commercial mobile services upon its finding that:

- \* enforcement of the provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
- \* enforcement of the provision is not necessary for the protection of consumers; and,
- \* declaring the provision inapplicable is consistent with the public interest.

The application of TOCSIA to cellular resellers such as PTC-C meets all three of these forbearance requirements.

1. Reasonable, Non-Discriminatory Charges and Practices

Enforcement of TOCSIA is not necessary to ensure reasonable and non-discriminatory charges and practices by rental car phone providers, since the competitive marketplace already deters unreasonable or discriminatory conduct. The rental car business is highly competitive and in this context car phones simply represent an extra feature of the underlying rental car offering. Rental car companies offer car phones because they believe it increases the value and attractiveness of the their offerings in the competitive rental car marketplace. Rental car providers

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<sup>12</sup> As discussed below, the Commission may not forbear from applying Sections 201, 202 and 208.



would surely lose valuable customers if they permitted the changing of unreasonable rates or unjust discrimination among customers.

Further, the cellular resale business as a whole is highly competitive. The Commission has never found it necessary to regulate cellular resellers and there has been no showing that a change in that policy is warranted here. Simply put, cellular resellers do not have sufficient market power to discriminate or charge unreasonable rates even if they so desired. Cf. Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations, Fourth Report and Order, 95 FCC 2d 554 (1983) (non-dominant carriers presumptively lack market power to engage in unreasonable or discriminatory conduct).

Moreover, to the extent that any rental car phone providers did charge unreasonable or unjustly discriminatory rates, such conduct is already prohibited under other provisions of Title II, such as Section 201, which the Commission is not allowed to waive. Therefore, there is already a sufficient regulatory framework in place that ensures reasonable and non-discriminatory charges and practices by cellular resellers. The enforcement of TOCSIA is not necessary in this regard.

## 2. Protection of Consumers

The enforcement of TOCSIA is not necessary to protect consumers of rental car phone services. The users of these specialized services are generally sophisticated consumers who

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GN Docket No. 93-252

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are unlikely to be defrauded or otherwise harmed. They generally understand that cellular phones do not operate in the same manner as a wireline phone.<sup>13</sup> These sophisticated consumers do not require the same regulatory protections that were deemed necessary for users of payphones, pursuant to TOCSIA.

Furthermore, customers of PTC-C sign contracts for the use of the hand-held cellular phones and receive full information as to the rates, terms, and conditions for the phones within the rental cars. More importantly, there is no history of complaints from users of this service comparable to the complaints concerning public wireline services that prompted Congress to enact TOCSIA.

Indeed, few callers would even use rental car cellular services unless they were informed of the terms and approximate costs, particularly since most services require an up-front payment or guarantee by credit card. In recognition of this marketplace reality, PTC-C clearly publishes the rates and conditions relating to its rental car phone services. Other rental car phone providers of which we are aware do the same.

Moreover, the rental car company obviously has an incentive to make sure that this ancillary service does not adversely impact the satisfaction of their rental car customers. As discussed above, car rental is a highly competitive business, in which cellular phones are one of many added features which car

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<sup>13</sup> For example, most users understand that they are charged for both the cellular air time and the long distance, roaming and other charges they incur.

rental companies use to add value and attract additional customers to their rental car offerings. These companies have a strong incentive to ensure that customers are comfortable with the terms of cellular service and that their cellular phone rates are competitive with those offered by other car rental companies. Given these marketplace realities, there is no reason why it is necessary for the Commission to apply the TOCSIA regulatory scheme to cellular resellers in order to protect consumers.

In addition, many of the underlying precepts of TOCSIA are clearly inapplicable to rental car phone services. For example, TOCSIA was concerned with excessive toll charges of certain presubscribed OSPs. Thus, TOCSIA requires free access code dialing from public payphones so that consumers can reach competing OSPs. But the primary expense of rental car phone service is the air time charge of the underlying cellular carrier. And even if the cellular carrier is deemed to be the OSP,<sup>14</sup> it is not feasible (and in fact could be physically dangerous) for customers in automobiles to dial the extensive digits required by access code calling to reach a long distance carrier, let alone the fact it is not technically feasible to reach a competing cellular carrier, as a literal application of TOCSIA would apparently require.

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<sup>14</sup> The Bureau determined that the facilities based cellular carrier is the OSP for GTE's Railfone and Mobilnet services. See, Declaratory Ruling, DA 93-1022, released August 27, 1993.

Further, as discussed below, in many areas the rental car phone provider cannot today readily designate a particular IXC since there is no uniform application of equal access obligations for cellular carriers.<sup>15</sup> Therefore, unrestricted access code dialing in many areas is largely ineffective and inapposite to TOCSIA's concerns.

In short, there is no indication that consumers of rental car phone services expect or need special protection, and even if they did, the enforcement of TOCSIA would not materially act to assist them in that regard.

### 3. Public Interest

Full compliance with TOCSIA by rental car phone providers and the underlying cellular carriers would be enormously expensive, cause consumer confusion, and would result in numerous illogical results. Forbearance from the application of TOCSIA to commercial mobile services will clearly serve the public interest.

For example, under the Bureau's decision discussed above, the underlying cellular carrier is deemed to be the OSP for TOCSIA purposes as it relates to rental car phones. However, the cellular carrier is not the party that gathers the billing information from the caller. Rather, billing information for the in-car rentals is gathered with a credit card swipe at the phone

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<sup>15</sup> See, MCI's Petition for Rulemaking on Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, RM-8012, filed June 2, 1992.

location, and for hand-held rentals, the information is stored in the handset. Thus, the cellular carrier would have no idea that it is providing an "operator service" for any given call.

This means that in order to comply with TOCSIA's branding requirement, the cellular carrier as the imputed OSP would have to "brand" every call that goes through its switch, not just those calls coming from an "aggregator" location. And since a rental car phone can be used with a multitude of different cellular carriers, virtually every cellular carrier in the nation would have to brand all of its calls. The result is that all cellular phone users -- even those who use their own phones -- must endure the inconvenience of a branding message every time they place a call. Moreover, the expense of requiring universal branding capability from all cellular carriers would be enormous and wasteful since it would be intended only for a small group of supposed beneficiaries. Finally, with cellular service, the very definitions of "local" versus "toll" service are much different than in a landline setting where TOCSIA has been applied, and pose problems for the application of the TOCSIA requirements.

Application of TOCSIA's "posting" requirement to rental car phone services would be similarly burdensome. Literal compliance would presumably require the posting of an extremely long list and/or complicated matrix showing every cellular carrier that could be used, since there are numerous combinations of destinations where the driver/caller might be and roaming arrangements between carriers. It is inconceivable how this

extensive information could be displayed "at or near the phone" as required by TOCSIA, especially with a miniature hand-held unit. And assuming this information could be displayed in such a manner that did comply, it would clearly be more burdensome than beneficial to the customer. Again, the pertinent information that a customer must know is already provided in the form of contracts, hand-outs, labels posted on the phone, etc.

In addition, as the OSP, the cellular carrier is technically responsible for filing an informational tariff. However, as discussed above, the cellular carrier would presumably have no idea that it is providing an operator service. It is therefore unclear how the cellular carrier could even comply with this requirement.

In sum, to impose such expensive and illogical requirements on rental car phone services would hinder competition and would unnecessarily impact all users of mobile services. Thus, it is clearly in the public interest to waive the provisions of TOCSIA to rental car phone services.

II. ALL FACILITIES-BASED CELLULAR CARRIERS SHOULD BE SUBJECT TO EQUAL ACCESS OBLIGATIONS.

As discussed above, even if TOCSIA is applied to rental car phone services, TOCSIA's blocking prohibition is, to a large extent, ineffective since all cellular carriers are not required

to provide equal access.<sup>16</sup> PTC-C would not necessarily object to a limited application of TOCSIA to require that cellular phone "aggregators" allow access code dialing to IXCs (not cellular carriers); however, in many areas PTC-C itself cannot designate an IXC. Thus, if the Commission does decide to apply some form of TOCSIA-style regulation,<sup>17</sup> it must first impose uniform equal access requirements on all facilities-based cellular carriers. In view of the merger between AT&T and McCaw Cellular, this is especially critical.

Indeed, such equal access requirements should be adopted regardless of the Commission's decision regarding the application of TOCSIA. In this regard, we note that on June 2, 1992, MCI Telecommunications Corporation ("MCI") filed a Petition for Rulemaking requesting equal access obligations for all cellular licensees. The Commission has received comment on MCI's Petition, but to date no action has been taken. The Commission should favorably decide the issues raised in MCI's Petition within the context of this proceeding. Alternatively, the Commission should promptly initiate a rulemaking based on MCI's Petition proposing equal access from all cellular carriers.

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<sup>16</sup> The cellular systems operated by the Bell Operating Companies or their affiliates are subject to equal access obligations by virtue of the U.S. v. AT&T consent decree.

<sup>17</sup> Such relationships must not include requirements such as branding, which as discussed above are clearly infeasible as well as unnecessary in the cellular context. Further, the Commission must first apply equal access to all underlying cellular carriers.



Whether or not this issue is addressed in this or a separate proceeding, the Commission should ultimately require uniform equal access by all cellular licensees. Indeed, uniform equal access is especially important in the cellular environment given that the users of cellular services frequently travel through multiple carrier service areas. Cellular resellers such as PTC-C as well as subscribers must have the flexibility to establish a consistent relationship with a particular IXC. This flexibility will allow resellers and subscribers to take advantage of certain marketplace efficiencies and will encourage the lowest rates and the highest quality toll services for all cellular users along with "full and fair [IXC] competition," an important goal of the Commission.<sup>18</sup>

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<sup>18</sup> See, e.g., Transport Rate Structure and Pricing, CC Dkt. No. 91-213, 6 FCC Rcd 5341, 5343 (1991).

WHEREFORE, for the reasons discussed herein, the Commission should forbear from the application of Section 226 of the Communications Act to commercial mobile services, and should impose equal access obligations on all cellular carriers.

Respectfully submitted,

PTC CELLULAR

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